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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/607,313	06/28/2000	Brad Baker	30687-US	6871

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PEACOCK MYERS, P.C.
201 THIRD STREET, N.W.
SUITE 1340
ALBUQUERQUE, NM 87102

EXAMINER

TRAN LIEN, THUY

ART UNIT	PAPER NUMBER
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1761

DATE MAILED: 03/24/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/607,313

Applicant(s)

BAKER, BRAD

Examiner

Lien T. Tran

Art Unit

1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 09 January 2006.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 30 and 32-52 is/are pending in the application.
- 4a) Of the above claim(s) 33-50 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 30, 32, 51 and 52 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

Art Unit: 1761

Newly submitted claims 33,35,34, 36,37,38,39-48, 49-50 are directed to an invention that is independent or distinct from the invention originally claimed for the following reasons: The new claims directed to the confectionary comprising a liminiferous confectionery, gas generating and gas releasing confectionery, flowable cofectionery comprising shaped pieces and fluid confectionery are distinct species because the types of confectionery are different. The claim directed to different bristle portion is distinct species because the shape is different. The claims directed to packaging are distinct because they pertains to packaged product. Claims 43-48 are unrelated and independent from the elected invention because the structure is different.

Since applicant has received an action on the merits for the originally presented invention, this invention has been constructively elected by original presentation for prosecution on the merits. Accordingly, claims 33-50 are withdrawn from consideration as being directed to a non-elected invention. See 37 CFR 1.142(b) and MPEP § 821.03.

Claims 30, 32 and 51-52 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

In the amendment filed 1/9/06, applicant amends claim 30 to add the limitation "a completely edible handle portion, a completely edible bristle portion". This limitation is not supported by the original disclosure. Page 5 discloses "a coatable portion and a

Art Unit: 1761

handle portion where these portions comprise edible material"; there is nothing about completely edible. The term completely is not disclosed. The limitation in claim 32 is not disclosed in the specification. The same problem is noted for claims 51-52.

Claims 30, 32 and 51-52 rejected under 35 U.S.C. 103(a) as being unpatentable over the brochure on "Paint Pop" product in view of Sinski and Chan.

The brochure discloses Paint Pop which comprises candy in the shape of a paint roller, a packet comprising candy powder and a paint tray. The candy powder is emptied into the paint tray and the candy is rolled in the paint tray for consumption. The candy has a non-edible handle portion an edible portion attached to the handle.

The brochure does not disclose the shape of a paint brush/paint can and the handle portion being edible and not covered in use.

Nickels disclose a paint can and paint brush combination. (see columns 3-4)

Sinski discloses a paint can having a lid securable to an opening of the paint can.
(see figures 4-5 and col. 3 lines 59-62)

Chan discloses a lollipop comprising a ball of hard candy and an edible stick inserted into a cavity of the ball of candy. The stick comprises pressed candy. (see col. 1 lines 28-35)

The claimed product differs from the prior art product in the shape. Applicant is moving from one conventional design shape to another conventional design shape. A paint tray, a paint can, a paint brush and a pain roller are all conventional shapes. To change from one conventional shape to another conventional shape would have been obvious to one skilled in the art because such shapes are all well known in the art.

Art Unit: 1761

Nickel shows a paint can and paint brush combination. It would have been obvious to one skilled in the art to make a paint can/paint brush candy combination because such shape is conventional in the painting product as shown by Nickels. As to the inclusion of a lid, it would have been obvious for one to include a lid when the product is made in the shape of paint can to prevent the content inside the container from falling out.

Engaging a lid on a paint can is notoriously well known in the art as shown by Sinski. It would have been obvious to make the handle to also be edible, as taught by Chan, in the lollipop to reduce wastage of the stick to give more candy to the product. The limitation of an completely edible handle portion does not define over the prior art because Chan teaches a completely edible handle portion. While there is a sleeve covering the edible handle portion, the sleeve is removed when the stick is consumed as disclosed by Chan on column 4 lines 26-28. The handle in Chan is not covered when in use.

In the response filed 1/9/06, applicant argues the handle in Chan is arguable only the plastic sleeve portion and thus has no edible portion whatsoever. The basis of this argument is unclear because Chan explicitly discloses the stick 6 is edible and the stick 6 is attached to the lollipop ball. Thus, the stick 6 is the handle which is edible. The claims do not exclude the plastic sleeve. Chan further discloses on column 6 lines 26-28, the sleeve is removed when it is desired to consume the stick 6. Claim 32 recites the handle portion is open and not covered when in use; this inherently indicates that the edible portion is covered when it is not in use. Thus, the examiner fails to see the distinction that applicant is making. Applicant further argues the three references are so

Art Unit: 1761

different that they cannot realistically be combined. The examiner maintains her position that both the claimed product and the prior art product differs in shape and to move from one conventional shape to another conventional shape would have been obvious to one skilled in the art. One of skill in the art knows that both paint can/brush and paint tray/roller are conventional shapes and the adaptation of the candy to either conventional shapes would have been an obvious variation. This is a variation in design choice with no alteration in function. There are many lollipop products commercially available and they come in many shapes, sizes and designs. Applicant argues the devices of Nickels and Chan alone or in combination do not disclose a non-edible rotating interface. The basis of this argument is not understood because the Nickels and Chan references are not relied upon for such teaching. The Nickels reference is used to show that a combination of paint can/paint brush is known in the art. The Chan reference is use to show that the handle portion of a lollipop product can be made to be edible. Applicant argues the rejection is the type of highly selective post-factor type of rejection. The examiner respectfully disagrees. Applicant's argument would have been persuasive if there is no teaching of any lollipop product which simulates actual paint product; in the instant case, the Paint Pop product is a teaching of a candy product which simulates actual paint product. The question is whether or not it would have been obvious to move from one conventional paint product shape to another conventional shape and the answer is yes because both paint can/brush and paint tray/roller are well known shapes for paint products. The substitution of one shape for another depends on the design desired and would have been obvious to one skilled

Art Unit: 1761

in the art. Applicant argues changing the shape of the Paint Pop product changes the principal operation of the product. The operation of the Paint Pop product is to roll the lollipop in the flowable confectionery to obtain the function of eating a combination of lollipop and confectionery. If the shape is changed to a paint can/paint brush combination, the same operation would still be carried out and the same objective is still obtained. The lollipop is not like a machine in which change the shape of the individual parts will change the operation of that machine. Applicant argues Chan and Nickels do not disclose a product as claimed. It is recognized that Chan and Nickels do not disclose the product as claimed. The references are relied upon for teaching of different features which in combination with the Paint Pop product would have made the claimed product obvious to one skilled in the art. Applicant's comment about a paint can with a lid is noted. The examiner respectfully disagrees with applicant that a paint can with a lid a vague assertions about an undocumented state of the art because one skilled in the art can see this combination in any commercially available paint can product. However, a reference is now used in the rejection to show this well known combination.

Applicant's arguments filed 1/9/06 have been fully considered but they are not persuasive.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Lien T. Tran whose telephone number is 571-272-1408. The examiner can normally be reached on Tuesday, Thursday-Friday.

Art Unit: 1761

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Cano Milton can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

March 19, 2006

Lien Tran
LIEN TRAN
PRIMARY EXAMINER
Group 1700